IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

APPEAL UNDER SECTION 109 No 9 of 1995

For Approval and Signature:

Hon'ble MR.JUSTICE K.R.VYAS

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

SHASHI INDUSTRIES

Versus

MAJA COSMETICS

Appearance:

MR RR SHAH for Petitioner

MS MEGHA JANI for Respondent No. 1

NOTICE SERVED for Respondent No. 2

CORAM : MR.JUSTICE K.R.VYAS

Date of decision: 01/12/2000

ORAL JUDGEMENT

The appellant- Shashi Industries has filed this appeal challenging the decision dated 13.3.1995 of Assistant Registrar of Trade Marks rendered in Application No. 445245 in Class - 3 for registration of the trade mark made by the appellant.

The facts giving rise to this appeal can briefly be summarised as under:

The appellant is a proprietary concern owned by Shashikant Ratilal Vadhar. The appellant carries on

business of manufacturing and marketing Agarbattis included in Class 3 since 1985. The appellant adopted the trademark "MAJA" in the year 1985 and has been using the same openly, continuously and extensively since then. The appellant applied for registration of the said trade mark "MAJA" on 6.11.1985 vide Application No. 445245 in Class - 3 as of 6.11.1985 in respect of Agarbattis. It is the case of the appellant that in the said application instead of mentioning the name Shashikant Ratilal Vadhar due to inadvertence the name of Shantikumar Ratilal Vadhar trading as M/s. Shashi Industries was mentioned. The said application was accepted by the respondent no. 2 Assistant Registrar of Trade Marks and was advertised before acceptance in the Trade Marks Journal No. 1040 dated 1.10.1992 at page 708.

On 21.12.1992, Smt. Mahender Kaur trading as M/s. Maja Cosmetics, respondent no. 1 herein, gave notice of her intention to oppose the registration of the trade mark as aforesaid. It appears that in the affidavit dated 31.1.1994 filed by the appellant as evidence in support of his application had later on indicated the name of the proprietor of the mark applied for, as well as his business concern namely M/s. Shashi Industries, as Shashikant. It is, thus, the case of the appellant that due to mistake in the name has gone out of sight by the Attorneys and when it came to their notice, the Attorneys immediately informed the respondent no. 2 that inadvertently the name of the proprietor Shri Shantikumar son of Ratilal had been typed in the application whereas the actual name of the proprietor is Shri Shashikant Ratilal. In fact, the said Attorney also pointed out further facts in the said letter and filed the amendment on TM-16 dated 24.1.1995 and again on 18.2.1995. Against the aforesaid averments, it was the contention of the otherside that the said fact clearly indicate that Shri Shantikumar Ratilal in whose name the registration of the mark applied for had been ceased to be the proprietor of the mark applied for, hence, to allow the instant application for registration in his name shall mean to allow the registration in the name of a person who is not in existence as proprietor of the mark applied for. It was, therefore, contended that the application for registration of the mark applied for, is void ab initio as per the provisions of Section 18(1) of the Act. The said contentions were raised by respondent no. 1 with a request to decide the same as preliminary issue.

The Assistant Registrar upheld the contention raised by the respondent no. 1 by holding that the

Tribunal should not allow the application for registration with doubtful claim of the proprietorship of the mark applied for. Such an application has to be treated as invalid application in terms of the provisions of sec. 18(1) of the Act. In view of this finding, the Assistant Registrar refused the application for registration of the mark applied for in exercise of his discretionary power contained under section 18(4) of the Act. In substance, the Assistant Registrar refused the application for registration without entering into the merits of the case. It is the said decision, which under challenge in the present appeal.

Learned counsel Mr RR Shah appearing for the appellant submitted that anomaly of names on the various documents appear to be out of inadvertence in the nature of typing mistake and the said mistake/over sight was on the part of the Attorneys and, therefore, the appellant should not be penalised. Mr. Shah along with this application produced various documents of correspondence between the appellant as well as its Attorneys, the assessment order of the Income Tax, Sales Tax registration-cum-demand note issued by the Indian Posts & Telegraphs Department. In all documents, name of Shashikant Ratilal Vadhar is shown as proprietor of M/s. Shashi Industries. These are the documents from 1973-74 up to 1992.

Mr. Mihir Thakore learned counsel appearing for the respondent no. 1 on the other hands, while supporting the decision of the Assistant Registrar, submitted that the discretion exercised by the Assistant Registrar is a discretionary order passed by the Assistant Registrar which cannot be interfered by this Court. To make good his submissions, reliance is placed on the decision rendered by the Supreme Court in the case of Registrar of Trade Marks vs. Ashok Chandra Rakhit Ltd., reported in AIR 1955, p. 558. He has also relied on the decision reported in 44 RPC, p. 27. The Apex Court, after relying on the decision reported in 44 RPC, p.27, has observed that "it is the Registrar to whom in the first instance is committed the discretionary power. If that authority has exercised his discretion in good faith and not in violation of any law, such exercise of discretion should not be interfered with by the High Court merely on the ground that, in the opinion of the High Court, it could have been exercised differently or even that the High Court would have exercised it differently, had the matter been brought before it in the first instance. The proper approach in such a case is for the High Court to consider, whether the Registrar had

really gone so wrong as to make it necessary to interfere with its discretion." There cannot be any dispute with respect to the principle laid down by the Apex Court. In a case before the Supreme Court, the Registrar, after considering the evidence on record passed the order of registration of trade marks. That was an order on merits. The said discretionary order was interfered with by the High Court and, therefore, the Apex Court laid down the guide lines with regard to the interference by the High Court. In the instant case, the Assistant Registrar upheld the preliminary contention of the respondent no. 1 without going into merits. In the opinion of the Assistant Registrar the registration of the mark was applied by Shantikumar Ratilal as the proprietor of M/s. Shashi Industries had been ceased to be the proprietor of the mark applied for and,therefore, if the application for registration applied for is granted, it would amounting to the registration in the name of a person who is not in existence as the proprietor of the mark applied for. For arriving at the said conclusion, it is observed by the Assistant Registrar that it does not appear to be an inadvertent mistake because when the appellant made his application on 6.11.1985, he had indicated the proprietorship in the name of Shri Shantikumar Ratilal Vadhar again after 7 and 1/2 years, he had written the name of the proprietor as Shri Shantikumar Ratilal. Such a repetition of the name after such a long time cannot be believed to be the repetition of mistake which as per the appellant's version occurred when the application filed. True, the appellant could have produced the documents to substantiate his say that it was an obvious mistake committed by its Attorneys. It appears that the learned counsel for the appellant afterwards, in fact, made attempts and requested from form TM-16 dated 24.1.1995 and again on 18.2.1995 to amend the name of the appellant as Shashikant Ratilal in place of Shantikumar Ratilal. The said request was rejected on the ground that the matter was already been heard and that was not the stage when the Tribunal can restart the proceedings. In my opinion, the Assistant Registrar at that stage taken too technical view in the matter. The Assistant Registrar could have called upon the appellant to produce necessary materials to substantiate the amendment sought for. Section-22 of the Act empowers the Registrar to permit an amendment of the application and or to permit correction of any error in, or an amendment of, a notice of opposition or a counter-statement under section 21. Thus, a discretion could have been exercised in favour of the appellant especially the case on hand is a case of inadvertence of mentioning the correct name and

especially when application as well as counter-statement have been filed under the signatures of the Attorneys. It is a specific case of the appellant that its Attorney at Bombay presented the application by inadvertently stating the name as Shantikumar instead of Shashikant and even at the stage of filing the counter-statement filed after about 7 & 1/2 years, the said mistake continued. The correspondence produced in the instant case clearly suggests that there was no fault on the part of the appellant and no sooner he came to know that his name has been wrongly stated in the proceedings, he has taken prompt action. Thus, this is a case where an obvious mistake has been committed by the Attorneys and for the same the appellant cannot be penalised. The appellant has, in fact, replaced the said Attorneys. From the documents of Income Tax, Sales Tax Certificate etc. prima facie it appears that Shashikant Ratilal is the proprietor of M/s. Shashi Industries, however, no final opinion can be expressed about the same. In my opinion, the appellant can produce the documents attached with this appeal and such other necessary materials to substantiate his say that Shri Shashikant and not Shantikumar is the sole proprietor of M/s. Shashi Industries. Hence, following order:

The appeal is allowed. The impugned decision dated 13.3.1995 taken in the matter of Application No. 445245 in Class - 3 rendered by Assistant Registrar of Trade Marks is set aside. The matter is remanded to the said authority with a direction to allow the parties to lead proper evidence in the matter to substantiate their say and to take appropriate decision afresh in accordance with law. There shall be no order as to costs.

(K. R. VYAS, J.)

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